Supreme Court, U.S.
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No. 97-293

In The

Supreme Court of the United States

October Term, 1997

HERMAN CORN, Trustee,

Petitioner,

vs.

THE CITY OF LAUDERDALE LAKES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

The City of Lauderdale Lakes respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's judgment and opinion in this case. That opinion is reported at 95 F.3d 1066 (11th Cir. 1993).

STATEMENT OF THE CASE

A. The Property In Dispute

In 1966, 261 acres owned by CORN were annexed into the CITY by Ordinance No. 104. (TR 44-45).[1] The land had been acquired by CORN at a cost of less than $5,000 per acre. (TR 57, 194). The property which is the subject matter of this dispute (subject property) consists of an 8.5 acre parcel of land in the southeast corner of CORN's property. (TR 84).

At the time when CORN's land was annexed into the CITY, there were discussions between CORN and the City Council regarding the zoning classification which would attach to various portions of CORN's property. (TR 64-67). All of CORN's property, with the exception of the subject property, was rezoned from "A" (agricultural) to either "R" (residential) or "B" (business) by Ordinance 105 upon annexation.

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[1] References to the transcript of the trial proceedings before Judge Paine in the United States District Court for the Southern District of Florida (August 12-15, 1991) shall be designated "TR" followed by the appropriate page number.

With regard to the subject property, CORN requested a "C" (commercial) designation. In response to CORN's request and in light of the CITY's concerns about how CORN would use the property, the CITY created a new zoning category, C-1A, specifically for the subject property. (*Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1376 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 1400 (1994), hereinafter "*Corn III*"; App. C). The "A" which was added to CORN's requested zoning classification of C-1 designated that the CITY was going to retain input into and control of the subject property's usage in light of its juxtaposition to the proposed residential development. (*Id.*; TR 461-462).

CORN expended funds in preparatory work on the C-1A property in conjunction with preparatory work done on the larger 261-acre parcel; no monies were expended on the C-1A property subsequent to the initial preparatory work for the ten-year period which preceded the submission of CORN's preliminary site plan. (TR 80-85).

By 1975, most of CORN's 261 acres had been developed by CORN and his affiliated companies. No development had yet been proposed for the subject property. (TR 71-72). During 1975, the CITY retained the services of a planner to create a land use plan and certify its compliance with Broward County's Master Land Use Plan. (TR 526-527). By law, all municipalities within Broward County had to be in compliance with Broward County's Master Plan by November of 1977. (TR 466, 526-527).

Throughout 1976 and early 1977, there were discussions at the City Council level regarding the propriety of

commercial zoning in proximity to residential areas. (TR 465-468). The land use planner retained by the CITY, Michael Shiff, had indicated that the juxtaposition of these two types of zoning was not consistent with good land use planning principles. (TR 527-528). Additionally, Mr. Scheingarten, Chairman of the CITY's Planning and Zoning Board, had independently recommended that the property which is the subject matter of this dispute be rezoned from commercial to business usage. (*Corn III* at 1376-77; TR 466, 566).

In April of 1977, prior to the City Council's initiating any definitive action to rezone the subject property based upon the recommendations of Shiff and Scheingarten, CORN submitted a preliminary site plan which called for the construction of a 67,000 square foot strip shopping center on the front portion of the property and a 900-unit, 103,000 square foot mini-warehouse storage facility on the rear portion of the subject property. (*Corn III* at 1376-1377).

The preliminary site plans submitted by CORN were reviewed by the CITY in the ordinary course of government. The plans were routinely forwarded to the CITY's consulting engineer for review to determine their compliance with applicable ordinances. (TR 551).

There were various meetings of the Planning and Zoning Committee wherein CORN's plans for development were discussed. (TR 98). A number of changes were requested. (*Id.*). CORN complied with some of the requests and declined to comply with others, citing disagreements with the CITY's interpretation. (TR 211-218;

Corn III at 1377). The Planning and Zoning Board eventually recommended on a 2-1 vote that CORN's preliminary site plan, as amended, be approved. (*Corn III* at 1377; TR 571).

The matter then came before the City Council for approval of the preliminary site plan. Approval of the preliminary site plan by the City Council was a prerequisite to the issuance of a building permit. A building permit could be obtained only after final site plan approval and after the submittal of a set of construction drawings which complied with all applicable requirements. (TR 209-210).

The question of preliminary site plan approval for CORN's project was discussed at several City Council meetings. (*Corn III* at 1377-1385; TR 471-478). Members of the Council and members of the community expressed concerns with the proposed development. (*Corn III* at 1377-1385; TR 473-478). The specific concerns voiced were that this mini-warehouse development would adversely affect the property values of the residences across the canal, that it would destroy the residential character of the neighborhood, that it would adversely affect traffic in their neighborhood, that the peace and quiet of the neighborhood would be destroyed by trucks and vehicles coming to the warehouses in the early morning and late evening, and that it would represent a significant fire hazard. (*Id.*).

On July 12, 1977, approval of CORN's preliminary site plan again came up for vote after having been tabled on several prior occasions. (*Corn III* at 1380-1384; TR 479).

At that meeting, the CITY passed on first reading Ordinance No. 548 which eliminated, among other things, mini-warehouses as a permissible use under a C-1 zoning classification. (*Corn III* at 1380; TR 483-484). The CITY also passed on first reading Ordinance No. 549 which rezoned CORN's land from C-1A to B-3. (*Id.*). The ordinances were not enacted at that time. Public hearings were held on Ordinances Nos. 548 and 549; they actually became law in September of 1977. (TR 485; *Corn III* at 1371, 1380). During the July 12, 1977 meeting, the Council voted to deny CORN's preliminary site plan because the plans he had submitted were deficient as to parking, fire protection and landscaping. (TR 488-489, 555-558). CORN never applied for a building permit and one was never issued. (TR 226).

On July 19, 1977, the CITY passed Ordinance No. 552 which called for a 150-day moratorium on all construction on all C-1 property within the CITY boundaries. (*Corn III* at 1381, 1384; TR 489). At the expiration of the 150-day period, the moratorium was extended by an additional 180-days by Ordinance No. 568 at which time it expired by its own terms. (TR 498). During the pendency of the moratorium, land use planning experts retained by the CITY as well as departments within the CITY rendered reports recommending against allowing commercial development on properties zoned C-1 within the CITY. (TR 490; *Corn III* at 1384-85).

The effect of the legislation enacted by the CITY was to prevent construction on the subject property until July 4, 1978. Thereafter, CORN was free to develop the property in any manner consistent with the business zoning. (*Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th

Cir. 1996) (hereinafter "*Corn IV*"); App. A-12 and A-13). The strip shopping center which made up the front portion of CORN's proposed development was a permitted use under the business zoning classification. There was no opposition to the construction of the shopping center which was the front portion of the project; the controversy concerned the mini-warehouse complex planned for the rear. (TR 233-234). Despite this, CORN never submitted any plans for the development of the shopping center subsequent to the expiration of the moratorium in July of 1978. (TR 227, 236).

B. The State Litigation

Subsequent to the adoption of the referenced legislation, CORN instituted state court litigation on August 11, 1977, challenging both the validity of Ordinances Nos. 548, 549 and 552 and the CITY's refusal to approve his preliminary site plans. (*Corn III* at 1371).

CORN set forth five causes of action in his state court complaint: Petition for Writ of Mandamus (Count I); Declaratory Judgment (Count II); Inverse Condemnation (Count III); Prior Determination (Count IV); and Injunctive Relief (Count V). The claim for inverse condemnation (Count III) was dismissed prior to the state court trial. (TR 306-307). The matter was tried in 1978 and final judgment ("state court final judgment") was rendered by the state trial court in October of that year. (App. G). The holding of the state trial court was that the CITY was equitably estopped to change the zoning because CORN had established vested rights in the subject property. (App. G-17). Moreover, pursuant to the state court final

judgment, CORN's preliminary site plans were found to contain three deficiencies violative of codified regulations concerning the adequacy of parking, fire protection and landscaping. (App. G-12 and G-13). However, Ordinances Nos. 548, 549 and 552 were ruled invalid as applied to CORN and his property and the CITY was directed to approve CORN's preliminary site plans upon their resubmission in proper form. (App. G-17).

The judgment of the state trial court was affirmed by Florida's Fourth District Court of Appeal in February 1983. (*City of Lauderdale Lakes v. Corn*, 427 So. 2d 239, 244, hereinafter *"State Corn"*; App. F). The state appellate court found that although an owner of property generally acquires no vested rights in the continuation of existing zoning under Florida law, the lower court's determination that CORN had detrimentally relied in good faith on the existing zoning so as to estop the city from enforcing the changes against him was supported by competent substantial evidence. (*State Corn* at 243-44; App. F-9).

After the Fourth District Court of Appeal had issued its mandate, CORN did not resubmit a preliminary site plan which complied with the directives of the state court final judgment until October 1983, seven months later. (TR 241). At that time, CORN was advised that it would be necessary for him to plat the property in order to comply with County, not CITY, requirements. (TR 595). CORN then did nothing for a period of another year until he filed suit in Broward County Circuit Court seeking a judicial decree that he did not have to comply with any County ordinances which were not in existence in 1977. (TR 596-597). The action was unopposed by the CITY. (TR 597). CORN obtained the relief he requested but chose

not to build the project and instead proceeded with a federal court action. (*Corn III* at 1372; TR 181, 183).

C. The Federal Litigation

1. The District Court Litigation

CORN filed his federal action against the CITY in 1984. Although the complaint originally included equal protection and procedural due process claims under the Fourteenth Amendment, those claims were abandoned by CORN prior to trial. (*Corn III* at 1372; App. C-4). The case proceeded to trial as a §1983 action on CORN's claims that the CITY had "taken" his property without just compensation in violation of his Fifth Amendment rights and that the CITY had deprived him of his substantive due process rights in violation of the Fourteenth Amendment. (*Id.*). CORN took the position at the federal court trial that the violation of his substantive due process rights had been established by the 1977 state court litigation. (*Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D. Fla. 1991), *aff'd in part, rev'd in part*, 997 F.2d 1309 (11th Cir. 1993), hereinafter "*District Corn I*"; App. D). The district court analyzed what had been tried in the state court litigation and determined that the state court final judgment would have no preclusive effect on the issue of whether the CITY's actions were arbitrary and capricious. (*Id.* at 1569; App. D-21).

The district court went on to find that the CITY had acted arbitrarily and capriciously and had deprived CORN of a constitutionally protected property interest and, therefore, had violated his substantive due process

rights. (*Id.*; App. D-23). The court did not make a determination of whether CORN's Fifth Amendment rights had been violated. (*Id.*).[2]

On the question of damages, the court reviewed the evidence presented by CORN and the CITY in light of the parameters set forth in *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990) ("*Wheeler IV*"). The court entered judgment in favor of CORN in the amount of $727,875.02. CORN, not satisfied with this amount, appealed the judgment as inadequate. (*Corn III*; App. C). The CITY cross-appealed the determination that it had violated CORN's Fourteenth Amendment substantive due process rights. (*Id.*).

2. The Eleventh Circuit Appeal (*Corn III*)

The Eleventh Circuit held that the trial court erred as a matter of law in its determination that the CITY had violated CORN's Fourteenth Amendment substantive due process rights and, consequently, reversed the finding of liability (*Corn III* at 1371; App. C-5). CORN's claim that the trial court had erred in its damage determinations was rendered moot by the reversal. (*Id.*; App. C-1).

Initially, the court found that the trial court had properly analyzed CORN's substantive due process claim

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[2] The district court reasoned that because the measure of damages was the same for either a violation of CORN's Fifth or Fourteenth Amendment rights, it did not need to decide the Fifth Amendment claim having already decided the case favorably to CORN on the Fourteenth Amendment claim. (*District Corn I* at 1569-70).

in light of the holding of *Rymer v. Douglas County,* 764 F.2d 796 (11th Cir. 1985). (*Corn III* at 1374). The court noted that the two components of the substantive due process test are conjunctive and a reviewing court finding an absence of one component need not decide whether the other exists. (*Corn III* at 1374; App. C-9 and C-10). The decision of the district court was reviewed in light of these principles.

The court then reviewed the district court's factual findings and found that the evidence introduced at trial established that the CITY's actions had a rational relationship to a legitimate general welfare concern and to the extent the district court found otherwise, those findings were "clearly erroneous." (*Corn III* at 1386; App. C-40).

In light of its holding, the court reversed the decision of the trial court and remanded the action to the district court with directions to consider CORN's Fifth Amendment claim upon which the trial court had previously declined to rule.[3]

3. District Court Upon Remand

Upon remand, the district court addressed CORN's Fifth Amendment "just compensation" claim for the first time. The district court received additional legal argument from the parties in the form of written status reports, but received no additional evidence beyond that

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[3] CORN's Petition for Writ of Certiorari to the United States Supreme Court seeking review of *Corn III* was denied.

which was presented in the August 1991 bench trial. (App. B-10).

The district court defined the legal issue presented as follows:

> CORN asserts through his just compensation claim that the impact of the CITY's invalid regulations effected a taking of his property interest in either the Subject Property or his proposed development. Therefore, the issue in this case is whether CORN's property (either his interest in the land or in the development project) has been taken without just compensation by virtue of the CITY's ordinances and action affecting each.

(App. B-10).

In analyzing the issue, the district court conducted an *ad hoc* inquiry, applying to the facts this Court's criteria, as enumerated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 916 (1978), for determining whether governmental regulation is so intrusive as to constitute a taking, that is: (1) interference with reasonable investment-backed expectations, and (2) economic impact on the landowner. (App. B-13).

Ultimately, the district court rejected CORN's just compensation claim with respect to both the project and the property. With respect to the former, the court found that CORN did not have a vested right to the development of his mini-warehouse project because the CITY had not issued a permit to CORN upon which he relied to his detriment, nor did CORN have a reasonable expectation in the unfettered development of the property. (App. B-17). The court further found that the ordinances did not effect a taking of the property because CORN was never

deprived of all "economically viable use" of the parcel. (App. B-15).

4. The Eleventh Circuit Appeal (*Corn IV*)

In the most recent appeal (*Corn IV*), the Eleventh Circuit disapproved of that portion of the district court's opinion finding that CORN did not have a vested right in the development of his project, noting that "the district court failed to consider the state court's holding that, under Florida law, Corn had acquired certain vested rights in the Project." (*Corn IV* at 1074; App. A-16).

Despite this, the court affirmed the district court's rejection of CORN's just compensation claim, because regardless of CORN's vested rights in the project, the " 'private property' " subject to the Fifth Amendment's prohibition . . . does not include every single property interest recognized by law." (App. A-16, at 1074). The court explained that in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), this Court rejected the type of narrow focus on particular rights in property "characterizing as 'quite simply untenable' the suggestion that a taking is established simply by showing that a landowner has been denied the ability to exploit a particular property interest." (*Id.*). Thus, based on this precedent, the Eleventh Circuit found that the dispositive question was whether "the denial of [CORN's] rights in the project denied him all or substantially all economically viable use of the Parcel. . . . " (*Corn IV* at 1074; App. A-16).

From this standpoint, the court determined that, CORN could use the Parcel for any use permitted in a B-3

zoning category, including the proposed shopping center. (*Corn IV* at 1072; App. A-12 and A-13). Because CORN was not denied all economically viable use of the property, the takings claim for the period after the moratorium failed. Accordingly, the Eleventh Circuit remanded the case back to the district court for further factual findings as to CORN's just compensation claim during the moratorium period, and affirmed the district court's judgment in all other respects. (*Id.* at 1076; App. A-21).[4]

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT IN ORDER TO ESTABLISH A FIFTH AMENDMENT JUST COMPENSATION CLAIM, CORN WAS REQUIRED TO SHOW THAT HE WAS DENIED ALL ECONOMICALLY VIABLE USE OF HIS PROPERTY.

CORN claims that the state court final judgment which estopped the CITY from enforcing its new zoning regulations against his property automatically transfers into a property interest under the Fifth Amendment for

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[4] On remand, the district court concluded that CORN was not denied all economically viable use of the Property because there existed economically viable uses of CORN's B3 zoning classification. (App. J-3). A final judgment was entered in favor of the CITY and the individual defendants and against CORN on the just compensation claim premised upon a temporary taking of the Property during the moratorium. (App. J-13). CORN filed a notice of appeal of the district court's Order on Remand which is pending before the Eleventh Circuit. (App. K-1).

which he may receive just compensation. The Eleventh Circuit properly denied this claim, reasoning as follows:

> Corn correctly notes that the property rights protected by the Fifth Amendment are created and defined by state law. . . . He errs, however, in suggesting that the Fifth Amendment requires the payment of just compensation for every deprivation of a right recognized by state law. "Property" as used in the Just Compensation Clause is defined much more narrowly than in the due process clauses. . . . Thus, while certain property interests may not be taken without due process, they may be taken without paying just compensation. (Citations omitted).

(*Corn IV* at 1075; App. A-19).

In fact, compensable rights under the Fifth Amendment have repeatedly been defined by whether their deprivation denies the owner of all, or substantially all, economically viable use of the property as a whole. As this Court noted in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), a "taking" may not be established simply by showing that a party is denied the ability to exploit a particular property interest that the owner believed was available, calling such a suggestion "quite simply untenable." The same reasoning is applicable to this case:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature

> and extent of the interference with the rights in the parcel as a whole. . . .

Id. at 130-31. Insofar as CORN has alleged the same type of segmented interest as was rejected in *Penn Central*, he cannot look to the deprivation of the Project alone to support his just compensation claim.

In fact, the limited number of cases in which the deprivation of a right has automatically transferred into a deprivation of the property itself involve those rights so inherent in property ownership that their deprivation alone constitutes a taking of the whole property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (right to exclude others); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (same). In other words, they have involved "traditional" property rights, as opposed to the more peripheral interests asserted by CORN.

Even in such cases, however, there is no automatic right to just compensation, as the relevant inquiry still requires the court to balance the effect of that deprivation on the value of the property. The factors to be considered were clearly enumerated by this Court in *Andrus v. Allard*, 444 U.S. 51, 65 (1979):

> The Takings Clause . . . preserves governmental power to regulate, subject only to the dictates of " 'justice and fairness.' " There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate . . . Resolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic. (Citations omitted). —

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction, has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66 (citations omitted). Thus, cases in which the deprivation of a right has supported a just compensation claim do not turn, as suggested by CORN, on some tangible definition of "property" under the Fifth Amendment. Even if CORN was deprived of something constituting a traditional Fifth Amendment "property" right, he would not recover unless he could show that the deprivation of that right affected his interest in the property as a whole.

As such, the Eleventh Circuit properly found that:

> regardless of what vested rights Corn may have had in the Project under Florida law, a denial of permission to build a particular development project does not, by itself, state a just compensation claim. To recover just compensation, Corn must show that the denial of his rights in the Project denied him all or substantially all economically viable use of *the Parcel*, not simply economically viable use of whatever property rights he has in the Project.

(*Corn IV* at 1074; App. A-16). This he cannot do. It is undisputed that CORN could use the Parcel for any use

permitted by the B-3 zoning category, including the proposed shopping center. (*Corn IV* at 1072; App. A-12 and A-13; App. J-3, J-4). Although the B-3 zoning category was a more restrictive classification, it did permit CORN to use the Property for any economically viable use permitted by the business classification. (App. J-3, J-4). It is upon these facts that the Eleventh Circuit correctly held that CORN's taking claim failed because he clearly had other economically viable uses for the Property aside from mini-warehouse.[5]

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[5] It should be noted that CORN presented no evidence that the construction of mini-warehouses was the primary expectation for the Property. (*Corn IV* at 1070.) Quite to the contrary, CORN owned the property for eleven years prior to presenting preliminary site plan for the mini-warehouse Project. (*Id.*). During those eleven years, CORN constructed and sold residential homes to resident of the CITY on a large portion of the property. (*Id.*) It was not until after reaping the profits from his residential development that CORN sought to build the mini-warehouses, literally, in the backyard of his buyers, potentially decreasing the resident's property values, and subjecting them to the problems of congestion, noise, traffic, aesthetics and safety issues which accompany such a Project. (*Id.*).

CORN also claims that he "expended in excess of $100,000 in reliance upon the City's annexation and zoning of the Property, developing the Property for C-1A use." (Petition for Writ of Certiorari at 5). CORN expended these funds in preparatory work done on the 261-acre parcel, however, most of which was developed into homes and condominiums that were sold by CORN and for which he presumably received profits. (*Corn IV* at 1070). CORN presented no evidence at trial that these funds were expended directly towards the Project. (App. D-3).

The Eleventh Circuit's decision in this case is consistent with the opinions of other circuits addressing the same or substantially similar issues. For instance, in *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), the court addressed the following, almost identical, set of facts:

> When plaintiff Scott, a real estate developer, sought a building permit to construct low income apartments in an area of Greenville County, South Carolina, zoned for the density of the project that he wished to build, the County Council halted issuance of the permit pending consideration of a rezoning of the proposed building site. Plaintiff obtained a state trial court ruling declaring the Council's action illegal and ordering immediate issuance of the permit. . . .

716 F.2d at 1411. In determining that Scott had failed to allege the deprivation of a property interest under the Fifth Amendment, the court reasoned that:

> Although we view Scott as having held an entitlement to permit issuance which was sufficiently a 'species of property' to require constitutional protection, the permit, until it is at least actually in hand, is not in the nature of interests the deprivation of which is encompassed by the Fifth Amendment "takings" doctrine. While Scott's right to the permit prior to issuance is entitled to protection under the due process clause, non-issuance of the permit did not effectively destroy the value of the building site, the rights to which Scott eventually sold.

716 F.2d at 1421-22.

The court delineated the deprivation in *Scott* from that in *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982), and *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), both of which have been cited by CORN in support of his position. In those cases, the regulations were found so onerous as to be confiscatory measures; that is, they were so invasive as to affect the property as a whole. *See Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

As between these cases, the difference is in the first part of the balancing test; that is, the degree of the regulation itself. This concept, in the context of a Fifth Amendment takings analysis, has been explained by Justice Holmes as follows:

> Constitutional rights like others are matters of degrees. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain.

Martin v. District of Columbia, 205 U.S. 135, 139 (1907). As in *Scott*, the degree of deprivation in this case was not so significant as to effect a taking of the property itself.

The claim that CORN is attempting to advance is a very dangerous one. As noted by the Eleventh Circuit in *Corn IV*:

> Corn's position would require the government "to regulate by purchase." Government would be required to pay just compensation whenever it deprived someone of a property interest,

> regardless of whether the deprivation violated due process or any other constitutional rights . . . . No longer would plaintiffs have to show that the government's action were arbitrary and capricious or procedurally deficient; showing deprivation of property alone would suffice to recover just compensation.

(*Corn IV* at 1075 n.6; and App. A-19, (citations omitted)). Thus, the court distinguished between the broad interests protected as property by the Due Process Clause, versus the more narrow property interests for which compensation may be available under the Fifth Amendment. Were all interests so compensable, CORN-like claims would quickly cripple local governments because a just compensation claim could be brought by any property owner who was denied a building permit or had any type of minute zoning restriction place upon him, regardless of the validity of the municipal law. CORN's suggestion would ultimately undermine the power and purpose of local governments to guard the health, safety, and welfare of its residents.

II. THE ELEVENTH CIRCUIT PROPERLY REJECTED, FOR THE SECOND TIME, CORN'S SUBSTANTIVE DUE PROCESS CLAIM.

A. CORN AGAIN ARGUES THE PRECLUSIVE EFFECT OF THE STATE COURT'S JUDGMENT ON A SUBSTANTIVE DUE PROCESS ANALYSIS.

The Eleventh Circuit, in *Corn III*, conclusively determined that CORN failed to establish a violation of his substantive due process rights. (App. C; *Corn III* at 1392).

From that decision, CORN unsuccessfully filed a Petition for Writ of Certiorari in this Court. *See Corn v. City of Lauderdale Lakes*, 511 U.S. 1018 (1994). The denial of CORN's petition for writ of certiorari made the legal conclusions of the Eleventh Circuit in *Corn III* final and law of the case, thereby barring relitigation. *Constant v. United States*, 929 F.2d 654 (Fed. Cir. 1991), *cert. denied*, 501 U.S. 1206 (1991).

As he did in his previous Petition, however, CORN again argues that because the outcome of the state court litigation was to find that CORN had a vested right in the continuation of the previously existing zoning regulations governing his parcel, the Eleventh Circuit was required to find that his substantive due process rights were violated as a mater of law. As this Court has already implicitly found by denying the prior Petition, this argument is still without merit.

Under Florida law, the concept of vested rights is a theory of estoppel amounting to nothing more than the application of the rules of fair play. An owner of property will acquire a vested right in the continuation of existing zoning or land use regulations when he (1) relies in good faith upon (2) some act or omission of the government and (3) has made such a substantial change in position or incurred such expenses that it would be inequitable and unjust to destroy the rights he acquired. *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 572 (Fla. 2d DCA 1975). Thus, it is the actions of the property owner, rather than the zoning authority, which determine the application of this theory of "vested rights."

To succeed upon a substantive due process claim, however, a property owner must allege and prove that the actions of the zoning authority were violative of rights conferred upon that individual by the Fourteenth Amendment, rather than the application of an equitable doctrine. There is absolutely no connection whatsoever between the state court judgment and a substantive due process claim.

B. THE "ROUGH PROPORTIONALITY" STANDARD OF *DOLAN V. CITY OF TIGARD* DOES NOT CONTROL CORN'S SUBSTANTIVE DUE PROCESS CLAIM AND *CORN III* IS THE LAW OF THE CASE.

In addition to restating the arguments previously advanced in favor of his first Petition, CORN also argues that this Court's opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), rendered subsequent to *Corn III*, represents controlling authority on the substantive due process issue by announcing a new standard of law which should be applied in this case.[6] The Eleventh Circuit rejected CORN's arguments in a footnote, simply stating that his

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[6] Corn's argument is derived from the Eleventh Circuit's opinion in *Westbrook v. Zant*, 743 F.2d 764, 768-69 (11th Cir. 1984), noting the following exceptions to the law of the case doctrine: (1) when the evidence presented in a second trial is substantially different from that presented in the first, (2) when controlling authority has since made a contrary decision of the law applicable to the issue, or (3) when the previous decision was clearly erroneous and would work a manifest injustice.

contention was "meritless". (*Corn IV* at 1071; App. A-9 and A-10).

First, *Dolan* simply does not involve a substantive due process claim, as this Court noted when it rejected Justice Stevens' implication that the case was actually grounded in substantive due process theory. 512 U.S. at 384. Where the zoning regulation in this case simply regulated the use to which CORN could put his parcel, the *Dolan* regulations required dedication of a portion of the land in exchange for a permit. *Id.* The difference is that "had the city simply required [the property owner] to dedicate" a portion of her land, "a taking would have occurred . . . Such public access would deprive [the property owner] of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Id.* citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); and *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

Moreover, even within the realm of takings jurisprudence, the *Dolan* exaction-type case significantly differs from the typical land use regulation cases:

> the sort of land use regulation discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own

> parcel, but a requirement that she deed portions of the property to the city.

Id. at 2316.

The ordinances at issue in this case involved all commercially-zoned property abutting residential property in the City of Lauderdale Lakes. Furthermore, the zoning ordinances were simply land use restrictions that did not impose upon CORN the obligation to deed portions of his land to the CITY or any other affirmative obligations. Moreover, at all times since the initial annexation of his property into the CITY, CORN has maintained the unabridged and unadulterated right to exclude others. Neither the enactment of the zoning regulations or the CITY's denial of his deficient preliminary site plan altered that essential right. Thus, the proper analysis in the instant case remains that which has traditionally been used to evaluate the typical land use regulation. That is, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 2320, n.8. As conclusively determined by *Corn IV,* CORN has not done so.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: October 15, 1997.

Respectfully submitted,

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APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-6034-CIV-PAINE

HERMAN CORN, Trustee

Plaintiff,

vs.

CITY OF LAUDERDALE LAKES, a Florida municipal corporation; HOWARD CRAFT; ALFONSO GEREFFI; JEROME J. COHAN; MORRIS KLEIN; LYMAN L. ALLEN; LOUIS GREENWALD; and HARRY KAUFMAN,

Defendant.

_____/

(Filed Apr 25, 1997)

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

This matter is before the court upon remand from the Eleventh Circuit as set forth in *Corn v. City of Lauderdale Lakes,* 95 F.3d 1066 (11th Cir. 1996) upon the very narrow issue of whether the City's moratorium effected a temporary taking of Corn's Parcel of property. The Court of Appeals vacated the judgment that was entered upon this court's finding that the moratorium did not effect a temporary taking of Corn's property because this court did not explain the specific factual basis for this conclusion. The appellate court affirmed this court's prior findings of fact and conclusions of law in all other respects.

The court agrees with the parties contentions in the appellate court that no further evidence need be taken in this narrow issue. Accordingly, the court enters the following additional findings of fact on the very narrow issue of whether Corn was deprived all economical viable use of his property during the Moratorium period, and conclusions of law on the very narrow issue of whether Corn suffered a temporary taking of his property as a result thereof. Because the facts of this case are set forth in detail in prior orders of this court and also in at least three published opinions, the court will not restate facts regarding any other issue save for the temporary taking/ economically viable use issue.

FINDINGS OF FACT

1. During 1975, the CITY retained the services of a land use planner, who questioned the propriety of C-1A zoning for the Subject Property (i.e. Corn's parcel of property). No formal action, however, was taken with respect to changing the zoning classification of the Subject Property until July 12, 1977.

2. On July 12, 1977, the City Council discussed changes in both the uses permitted within C-1A property and the zoning classification of CORN's property. The City Council in fact passed two ordinances on first reading that were ultimately adopted:

a. Ordinance 548 amended Article XXXVII, Section 37.2 of the Broward County Zoning Classification Restrictions and Regulations, as adopted by reference, to

eliminate storage warehouses as a permitted use in category C-1, the pre-existing category at the time of annexation, and consequently, category C-1A, the category created for the Subject Property after annexation; and

b. Ordinance 549 rezoned Corn's Property from C-1A (commercial) to B-3 (business), a more restrictive category.

3. Accordingly, as of July 12, 1977, Corn's property was rezoned to the B-3 zoning classification which permitted Corn to develop the property in any way permitted by the category classification. Although this was a more restrictive classification, it did permit Corn the opportunity to use the property for any economically viable use permitted by the business classification.

4. After passing Ordinances 548 and 549, the City Council voted unanimously to deny approval of CORN's site plan which included construction of a shopping center on the front portion and a mini-warehouse on the rear portion. The City's actions in both passing the ordinances and denying CORN's site plan in accordance therewith were motivated by and substantially related to general welfare concerns about congestion, noise, traffic, aesthetics, safety and property values.

5. Ordinance 552, which imposed a 150 day building moratorium on all C-1 property in the CITY, was proposed at the July 12, 1977 meeting and later adopted. The stated purpose of the moratorium was to permit the Planning and Zoning Board, which had purportedly advised that C-1 property abutting residential property should be rezoned, to review the CITY's commercial zoning scheme. Because of the passing of ordinance 549

which rezoned Corn's property from C-1A property to B-3 property, even during the moratorium on C-1 property, Corn could have used the Parcel for any use permitted by the B-3 zoning classification.

5. [sic] Through Ordinance 568, the City Council extended the building moratorium on commercial property through July 4, 1978.

6. Despite the ability to pursue development on his Parcel in accordance with any use permitted by the B-3 zoning classification, Corn chose not to pursue development of the Subject Property which he still owns and has never developed. Development of the originally proposed shopping center on the front portion of the Subject Property was possible at any time after July 13, 1977, when the Subject property was rezoned to a B-3 classification. Additionally, at any time after the July 12, 1977 rezoning, CORN could have developed the rear portion of the Subject Property originally planned for mini-warehouses, in any other way permitted by the business zoning category.

THE LEGAL ISSUE DEFINED

CORN asserts that he suffered a temporary taking of the Subject Property if he was denied all or substantially all economically viable use of the Parcel during the moratorium period. The issue remaining on remand is whether Corn was denied all or substantially all economically viable uses of the subject property during the moratorium and, if so, whether such deprivation rises to the level of a temporary taking.

CONCLUSIONS OF LAW AND APPLICATIONS TO THE FACTS

1. A just compensation claim, as opposed to other types of takings claims, does not seek "an invalidation of the local authority's application of the regulation," *Eide v. Sarasota County,* 908 F.2d at 721, but simply monetary compensation for the value taken. *Reahard v. Lee County,* 968 F.2d at 1131. Generally, the landowner in a just compensation takings case must demonstrate that his property was "taken," that the regulation "goes too far" and that there is no provision to award him just compensation. *Eide,* 908 F.2d at 720. Therefore, the essential question inherent in a just compensation claim is whether the valid regulation goes so far as to be a taking. *See Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") Further, because takings decisions depend largely upon the particular circumstances in each case, each case is to be decided *ad hoc* by applying the law to the particular facts. *Reahard* 968 F.2d at 1135. A proper takings analysis should address the following questions: (1) the history of the property; (2) the history of development; (3) the history of zoning regulation; (4) how development changed when title passed; (5) what is the present nature and extent of the property; (6) what were the reasonable expectations of the landowner under state common law; (7) what were the reasonable expectations of the neighboring landowners under state common law; (8) what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation. *Id.* at

1136. Each of the factual issues has been addressed in the Findings of Fact[1] and the legal issues are addressed below.

2. In this Circuit, the first test as set forth in *Nolan* [sic] is bypassed because a claim for just compensation necessarily involves a regulation that substantially advances a legitimate government interest. *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). Therefore, because just compensation claims admit and assume that the subject regulation substantially advances a legitimate government interest, the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property. *Id.; see also Eide*, 908 F.2d at 721; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (recognizing that governmental action "so complete as to deprive the owner of all or most of his interest" can amount to a taking); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

3. The next question presented then is how far is too far? Using *ad hoc* factual inquiries, the courts have identified several significant factors in determining whether a taking has occurred because a government's actions have gone too far and have denied the landowner all or substantially all economically viable use of his property: 1) interference with reasonable investment-backed expectations, and 2) economic impact to the landowner. *Penn*

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[1] The court's prior Findings of Fact are incorporated herein by reference to the extent that they are necessary to support these additional findings.

Central, 438 U.S. at 124; *Reahard v. Lee County*, 968 F.2d at 1136. This analysis must be explored in light of developing case law that has shaped and defined the meaning of these factors. *Reahard v. Lee County*, 968 F.2d at 1136.

4. Regarding the deprivation of reasonable investment-backed expectations, the Supreme Court has traditionally looked at the existing use of the property as a basis for ascertaining the owner's "primary expectation concerning the use of his parcel." *Penn Central*, 438 U.S. at 136. In *Andrus v. Allard*, 444 U.S. 51, 66 (1979), the Court specifically rejected the court's giving serious consideration of future profits and anticipated gains when it said that "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Id.* CORN made no use of the Subject Property since purchasing it in 1966. He did, however, construct and sell residential structures on the land surrounding the Subject Property. In 1977, having attempted no use of the Subject Property for 11 years, CORN submitted his first preliminary site plan for development of the Subject Property and proposed for the first time, construction of mini-warehouses. By that time, he had completed his build-out of the residential parcels and the Subject Property where the mini-warehouses were to be constructed was, quite literally, in the back yard of residents who had purchased their homes from him. By that time, the use CORN proposed to make of the Subject Property (i.e. construction of a 900 unit mini-warehouse) was contrary to the general welfare concerns about congestion, noise, traffic, aesthetics, safety, and property values. *See Corn* 997 F.2d at 1386. There was no evidence presented that the construction of mini-warehouses was

ever CORN's primary expectation for the Subject Property or that he had invested in items specifically suited for a single development project that were rendered unusable, or rendered the Subject Property unusable, for any other purpose for which it could have been developed. Any expectations CORN may have had regarding use of the Subject Property are not backed by any investment other than his original purchase. Further, because the property remained suitable for business development it cannot be said on this record that CORN suffered a diminution in investment-backed expectations.

5. Turning to the economic impact of the town's ordinances and activities on CORN's property, the threshold for finding a taking is the denial of "economically viable use." *Agins*, 447 U.S. at 260. Compensation is ordinarily required if the challenged restriction made the property "wholly useless" so that "the rights of property . . . prevail over the other public interest." *Penn Central*, 438 U.S. at 128 (citations omitted). To examine this factor, the courts require a "final authoritative determination of the type and intensity of development legally permitted." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). "A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes." *Id.*

6. The *Nollan* test that the challenged statute "substantially advance a legitimate state interest" is not to be determined in the context of this just compensation analysis. However, the fact that the stated purpose of Ordinance 552 was to permit the Planning and Zoning Board to review the CITY's commercial zoning scheme in light of its previous suggestion that all C-1 property abutting

residential property should be rezoned, is relevant to this Court's finding that Ordinance 552 did not go too far. The ordinance initially effected a reasonable 150 day building moratorium on development of all commercial property in the CITY. While the duration of the moratorium was later extended, it cannot be said, in light of the need to satisfy the reasonable purpose of the ordinance and the length of time that CORN's property lay dormant before the enactment of it, that the duration of the moratorium was unreasonable.

7. The moratorium ordinance went far enough to serve its stated purposes but not so far as to justify CORN's just compensation claim. Under the new zoning Ordinance 549, which the City passed on first reading on July 12, 1977, Corn's property was rezoned from C-1A (commercial) to B-3 (business). Accordingly, even during the moratorium on C-1A development, Corn could have developed his property in any economically viable way permitted by the B-3 business-zoning classification. Corn did not present any evidence to prove that, as a matter of fact, his newly zoned B-3 property was rendered wholly useless by the imposition of a moratorium on C-1A property. There is no evidence in this record that during the moratorium period Corn desired to and/or attempted to use his property for any use other than the shopping plaza/mini warehouse development project. There is no evidence in this record that, after 7-12-77 or during the moratorium period on C-1A property, Corn was denied or prohibited the right to develop his property in any way permissible by the B-3 zoning classification. Accordingly, because there existed economically viable uses of

Corn's B-3 property during the moratorium on development of C-1A property, the court finds that Corn was not deprived of all economically viable use of the Subject Property. The fact that before, during, and, it appears, after[2] the moratorium ended, Corn never desired, attempted or was refused permission to develop the Subject Property in any of the many permissible, lawful and profitable ways permitted by the B-3 zoning classification, weighs heavily in the determination that he was never denied all economically viable uses of the property. The evidence established that at all relevant times, Corn persisted in the pursuit of a single development – the mini-warehouses – to the exclusion of all other permissible uses. It was Corn's decision not to pursue the *permissible* B-3 classification uses and not the City's moratorium on development of C-1A property, which resulted in the failure of the Subject Property to be put to profitable use. Corn simply did not prove that during the moratorium period on C-1A property, he was wholly prohibited from developing his B-3 Subject Property.

Accordingly, Corn has failed to carry his burden of proof on the issue of the unavailability of economically viable uses of the subject property. Therefore, because Corn, the landowner, has failed to prove that there was a "taking" or that the regulation "went too far" as this

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[2] Even after the state court judge entered an order enforcing the final judgment therein, Corn chose not to pursue development of the Subject Property in any permissible way, which, at the time of the trial in this court, he still owned and had never developed in any way.

court previously ruled in its Findings of Fact and Conclusions of Law, he is not entitled to just compensation from the Defendant City.

In view of the foregoing Supplemental Findings of Fact and Conclusions of Law, it is hereby

ORDERED and ADJUDGED that final judgment be entered in favor of the CITY and the individual defendants and against the Plaintiff CORN, on Count I, the just compensation claim premised upon a temporary taking of the Subject Property during the moratorium.

DONE and ORDERED at West Palm Beach, Florida, this 25th day of April, 1997.

/s/ James C. Paine
UNITED STATES
DISTRICT JUDGE

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APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

HERMAN CORN, Trustee,

Plaintiff,

vs.

CASE NO.
84-6034-CIV-PAINE

FBN: 260827

CITY OF LAUDERDALE LAKES, a Florida municipal corporation; HOWARD CRAFT; ALFONSO GEREFFI; JEROME J. COHAN; MORRIS KLEIN; LYMAN L. ALLEN; LOUIS GREENWALD; and HARRY KAUFMAN,

Defendants

_____/

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, HERMAN CORN, Trustee, hereby appeals to the United States court of Appeals for the Eleventh Circuit from the Final Judgment and Findings of Fact and Conclusions of Law Upon Remand entered in this action on April 25, 1997, and the Order Denying Plaintiff's Motion to Set Aside Findings of Fact and Conclusions of Law and For New Trial entered in this action on the 30th day of June, 1997.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to MICHAEL C. MATTSON, ESQ., Cooney, Haliczer, Mattson, Lance, Blackborn, Pettis &

Richards, P.A., 301 East Las Olas Boulevard, Fort Lauderdale, Florida 33302 and JAMES C. BRADY, ESQ., Brady & Coker, 1318 S.E. 2nd Avenue, Fort Lauderdale, Florida 33316 this 29th day of July, 1997.

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APPENDIX L

No. 93-1308

In The

Supreme Court of the United States

OCTOBER TERM, 1993

HERMAN CORN, Trustee,

Petitioner,

vs.

THE CITY OF LAUDERDALE LAKES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. (a) When a land owner, consistent with the directive of this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), defers pursuing his federal constitutional and civil rights claims in a land use regulation controversy until a final adjudication of his state law-defined rights in property in the appropriate state court is reached, may a Federal Circuit Court of appeals ignore and override final factual findings and legal determinations made in the earlier state court proceedings (as well as the findings of the United States District Court consistent with the earlier final state court judgment) and purport to adjudicate that owner's rights to use his land as if a court of first instance?

(b) When such Circuit Court adjudication conflicts with the state court final judgment and the District Court factual findings, does that adjudication (1) defy this Court's holding in *Williamson County*, (2) violate the rights of that land owner to due process of the law, (3) contravene the constitutional doctrine of comity; (4) ignore federal law relating to full faith and credit (as well

as collateral estoppel and other doctrines of preclusion), and (5) improperly divest the District Court of its function as finder of fact?

2. (a) Where a landowner enjoys a fully vested right to build on his land in a City according to present zoning, confirmed by a final judgment of a state court of competent jurisdiction, which judgment also expressly estops the City from changing the zoning, may the City constitutionally deprive him of that right by a purported change in zoning?

(b) In this situation, when the City – in ostensible review of a site plan consistent with a development plan it has already approved (by state law, a nondiscretionary ministerial review limited to insuring technical site plan compliance) – nonetheless changes the zoning without notice, prehearing investigation or competent supporting evidence, thus depriving the landowner of his vested rights and preventing him from building, does that City deny the landowner due process of law and just compensation?

3. In *Eide v. Sarasota County*, 908 F.2d 716, 720 (9th Cir. 1990), *cert. denied* 498 U.S. 1120 (1991), the Eleventh Circuit first articulated a conceptual construct that there are precisely "four types of challenges [based on allegedly unconstitutional land use regulation] a plaintiff may bring . . . [1] just compensation, [2] due process takings, [3] arbitrary and capricious due process and [4] equal protection claims." This construct was the template of the Circuit Court's opinion below. Is this construct consistent with this Court's rule that challenges to the

constitutionality of land use regulations are to be determined on an ad hoc basis?

4. Does the Eleventh Circuit's explication of substantive due process rights in this case (and other land use cases) correctly explicate the law of this court, or are conflicting interpretations from other Circuit Courts of Appeal, and other state courts, correct?

5. What is the proper measure of damages for a temporary taking of property set aside for a particular authorized and appropriate development if, when development is unlawfully delayed and then finally permitted, the economic window of opportunity for that development has vanished?

PARTIES TO THE PROCEEDINGS

Plaintiff, appellant and cross-appellee, and petitioner is Herman Corn, Trustee, Defendants and respondents are the City of Lauderdale Lakes, a Florida municipal corporation (the City), Howard Craft (Mayor), Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald and Harry Kaufman (City Councilmen).

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PETITION FOR WRIT OF CERTIORARI

Herman Corn, Trustee, respectfully seeks Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The August 13, 1993 opinion of the United States Court of Appeals for the Eleventh Circuit is published at 997 F.2d 1369 (11th Cir. 1993), and is reproduced herein – with the subsequent order denying rehearing and a suggestion for hearing en banc – as Petitioner's Appendix A1-60.

That opinion affirmed in part and reversed in part the August 30, 1991 decision of United States District Court for the Southern District of Florida, published at 771 F.Supp. 1557 (S.D. Fla. 1991) and reproduced herein as Petitioner's Appendix B1-32. The subsequent District Court order awarding attorney's fees is at 794 F.Supp. 364 (S.D. Fla. 1992), and reproduced herein as Petitioner's Appendix C1-16.

Since the late 1960's the extended controversy to which these opinions speak has generated eight published opinions and a number of unpublished decisions, by state and federal courts. The remaining published opinions are: 371 So.2d 1111 (Fla. 4th Dist.Ct.App. 1975); 415 So.2d 1270 (Fla. 1982); 427 So.2d 239 (Fla. 4th Dist.Ct.App. 1983), reproduced herein as Petitioner's Appendix D1-11; 816 F.2d 1514 (11th Cir. 1987); and 904 F.2d 585 (11th Cir. 1990). A further order of the Eleventh

Circuit, reversing an award of attorney's fees to petitioner, is at 3 F.3d 442 (11th Cir. 1993). Orders of the Florida Circuit Court in and for Broward County dated January 28, 1970 and May 18, 1971 (with accompanying stipulation) are reproduced herein as Petitioner's Appendix E1-6.

JURISDICTION

This is an action for deprivation of property without due process of law or just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983). The judgment of the Eleventh Circuit was entered on August 13, 1993. Mr. Corn's petition for rehearing and suggestion for a hearing en banc was denied on October 14, 1993. The federal court action for damages followed a state action culminating in a final judgment invalidating City ordinances 548, 549 and 552 and holding that the City had no discretion to act as it did – holdings recognized by the District Court, yet ignored by the Eleventh Circuit, which found the City's actions valid.

An extension of time within which to file this petition for a writ of certiorari to February 11, 1994, was granted by order of Justice Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, on December 29, 1993.

This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

City of Lauderdale Lakes ordinances nos. 103, 104, 105, 548, 549, and 552 are reproduced herein as Petitioner's Appendix F1-25.

STATEMENT OF THE CASE

A. Introduction

Twenty-eight years ago, in 1966, the subject 261 acres was annexed to the City of Lauderdale Lakes, to which it was contiguous, by means of an annexation agreement between the City and the property owner, Mr. Corn. The agreement, which included a development plan and site-specific zoning, was memorialized and implemented through City ordinances nos. 103, 104 and 105, enacted at the time of annexation.

Since 1969, controversies having their genesis in the City's efforts to thwart Mr. Corn's rights under the 1966 agreement (notably – but not exclusively – improvement of 8.5 acres of commercial development) have generated eight reported state and federal court decisions (identified *ante*), as well as several unreported decisions. Until the August 13, 1993 Eleventh Circuit Court of Appeals opinion inexplicably returned to square one to decide *de novo* issues previously and finally adjudicated in Florida state courts (as a matter of state law) and reaffirmed repeatedly in federal courts, the decisions have invariably required the City to adhere to its commitments and held (a) that Mr. Corn's rights to build on his land had vested under state law thus becoming protected property rights, (b) that the City lacked discretion to deny approval of the site plan, and (c) that the City was estopped from changing the existing zoning.

B. In 1966, Mr. Corn And The City Enter Into An Annexation Agreement That Included Approval Of A Development Plan And Site-Specific Zoning Consistent With That Development Plan

In 1966, the City and Mr. Corn agreed – after extended negotiations – to the annexation of his 261 acres (the Larger Site) located in an unincorporated area in Broward County, Florida, contiguous to the City. (771 F.Supp. at 1559-60; App. B1-2)[1] As is often the case, an intrinsic part of the annexation agreement was the City's

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[1] Without the cooperation of Mr. Corn, it would have taken an act of the Florida legislature or a formal referendum to enable the City to annex this land. Fla. Stat. Section 171 *et seq.*

approval of a proposed development plan – the *raison d'etre* for the annexation. All this was memorialized in ordinances adopted by the City on July 12, 1966. As the Eleventh Circuit put it in its earlier 1987 Opinion: "The ordinances, respectively, annexed Corn's property [No. 104]; applied a variety of zoning classifications to his land [No. 105]; and allowed Corn to construct mini-warehouses in a portion of his property zoned C-1A [No. 105]." (816 F.2d at 1515)[2] (Ordinance 103 created zoning category C-1A from pre-existing category C-1.)

C. A 1969 State Court Final Judgment Confirms Mr. Corn's Right To Build And Estops The City From Changing The Zoning On The Property

The next event of significance was thus recounted in a subsequent state court opinion:

> In 1969 the city attempted to change the zoning of a portion of appellee's property to prohibit a contemplated project [condominium housing] permitted by the original zoning. Litigation ensued resulting in a judgment holding that the city was estopped from changing the zoning. No appeal was taken from that judgment.

City of Lauderdale Lakes v. Corn, 427 So.2d at 240-41; App. D2. An examination of the January 28, 1970 order and

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[2] The 1966 ordinances did not identify "mini-warehouse" as the precise eventual use, but (in typical zoning terminology) expressly allowed any of several specified commercial and industrial uses, one of which was warehouse. (*See* 997 F.2d at 1371; App. A2-3)

May 18, 1971 final judgment (App. E2, 5), in context, demonstrates that the estoppel reference was to the entire Larger Site, including the 370 foot by 1030 foot 8.5 acres zoned C-1A (the Property) (TR 84).[3]

Between 1966 and 1977, Mr. Corn developed much of the Larger Site consistent with the approved development plan, logically developing the housing first. (771 F.Supp. at 1560; App. B2; TR 81) In reasonable reliance on the earlier approved development plan, he spent in excess of $100,000 toward development of the Property; improvements included waterways which formed a barrier between the Property and the residential parts of the Larger Site. (771 F.Supp. at 1560; App. B2)

D. Defying The State Court Estoppel Order And Reneging On Its Own Agreement, In 1977 The City Council Purports To Deny The Development It Had Approved At The Time Of Annexation And To Rezone The Property

1. The Mini-Warehouse Presents Mr. Corn With An Extraordinary Economic Opportunity

On April 1, 1977, Mr. Corn submitted a preliminary site plan for a 67,000 square foot shopping mall which would front the main adjoining thoroughfare (U.S. 411), and a 103,000 square foot mini-warehouse, separated from the thoroughfare by the mall and from surrounding

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[3] Another effort to renege on its 1966 commitments was launched by the City in 1976 (Circuit Court for the 17th Judicial District of Broward County, Florida case No. 76-7105). This, too, was resolved in Mr. Corn's favor.

residences by the waterways. (771 F.Supp. at 1560; App. B2-3) This site plan was (in the words of the final state court opinion) "in accordance with the development plan submitted to and approved by the City . . . " (427 So.2d at 241; App. D3)

At that time, small warehouses in which individuals might store personal property were just coming into vogue; there was no such facility in Lauderdale Lakes. (TR 3:500) Had the proposal been approved, this development – as subsequent experience of other entrepreneurs demonstrated – would have provided an exceptional business opportunity for Mr. Corn, and also provided a significant convenience for local residents.

2. City Council Actions, Which Overruled Planning And Zoning Board Recommendations, Were Taken Without Advance Notice, Investigations As To Their Appropriateness, Or Supporting Evidence

On May 12, 1977, the City's Planning and Zoning Board recommended approval of Mr. Corn's site plan; on May 27, 1977, it reaffirmed that recommendation. (771 F.Supp. at 1560; App. B3)

When it finally acted on the Corn site plan on July 12, 1977 (having tabled consideration of the matter three times), the City Council introduced and at the same meeting formally enacted two ordinances: Ordinance 548 eliminated warehouses as a permitted C-1A use, and Ordinance 549 rezoned the Property (and *no* other land) to B-3. (771 F.Supp. at 1560; App. B3, F12-21) These ordinances were passed without any advance notice to Mr.

Corn or to the public that any act beyond passing on the pending site plan would be considered. This ambush manifestly violated not only constitutional due process protections and basic fairness, but also the City's own duly enacted procedural standards: Lauderdale Lakes City Code § 25.5.5 requires a ten-day notice and a Planning and Zoning Board hearing on any proposed zoning change before the City Council may act.[4] The Council then denied approval of the Corn site plan as inconsistent with the (newly) created zoning, with no suggestion that the site plan might be modified to make it acceptable. (771 F.Supp. at 1560; App. B3)

Prior to the July 12 hearing, the City had made no effort to investigate mini-warehouses to determine empirically their impact on traffic, noise, etc. (771 F.Supp. at 1560; App. B4; TR 3:500-02) At the hearing, the City Council proposed a moratorium (later formally adopted as Ordinance 552 and extended), ostensibly to study and evaluate the impact of C-1 zone uses, and particularly mini-warehouses. (771 F.Supp. at 1560; App. B3-4, F22-25) The study thus post-dated the zoning change it was supposed to justify.

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[4] At the federal district court trial, former City Mayor Howard Craft conceded that there was no notice, that there was no investigation prior to the hearing ("we never heard of mini-warehouses"), that the City did not consider its 1966 agreements, that this was the only time of which he was aware that the City Council did not follow a Planning and Zoning Board recommendation, and that the rezoning and use deletion was unprecedented in City history. (TR 3:470-71, 494-500, 507-09)

3. City Council Actions Were Taken In Response To Pressure From Neighborhood (NIMBY) Activists

It is undisputed that all of these 1977 City Council acts taken to frustrate Mr. Corn's vested rights were a response to political pressure by neighborhood NIMBY (the often-used acronym for "Not In My Back Yard") activists – ironically for the most part living in the housing. Mr. Corn had developed. (*See, e.g.*, 997 F.2d 1378-84; App. A19-34) These activists appeared in significant number, but – like the City itself – offered no sworn testimony or other cognizable evidence which could support the City's illegal rezoning (which, of course, would have been impermissible anyway in view of the state court judgment).

E. Mr. Corn In The State Courts: Vested Rights, Lack Of Discretion, And Illegality Of City Acts Are Confirmed In A Final Judgment

After these City acts, Mr. Corn sued the City and the City officials identified *ante* in the Circuit Court of the Seventeenth Judicial District in and for Broward County (Case No. 77-12955). (771 F.Supp. at 1561; App. B4) At that time (prior to this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)), Florida categorically forbade money damages as a remedy for unconstitutional land use regulation, no matter how severe the consequences to the landowner. *See Corn*, 816 F.2d at 1517.

Following a trial, the trial court entered its final judgment on October 20, 1978, holding that the waterways and other improvements were made by Mr. Corn in express reliance on the approved development plan, that the City's July 12 actions were taken without notice, and that "Ordinances #548, #549 and #552 were enacted by the City improperly and not in accordance with the requirements of the City Charter." (427 So.2d 241; App. D4) The court specifically held that the City failed "to follow its own notice and procedure requirements (and did not make the requisite showing of compelling health, safety or welfare considerations. (427 So.2d at 242, App. D4) The City Council's action was found to be in direct response to the "demands" of the neighborhood activists "without consideration of the rights of the Plaintiff herein pursuant to the Ordinances of the City of Lauderdale Lakes." And finally, the court expressly held that the City was "estopped to deny Plaintiff's rights in [the original] zoning classification." (427 So.2d at 242; App. D5) and that ordinances 548, 549 and 552 were void and unenforceable. (App. D5) The Court's writ of mandamus directed the City to approve the site plan (upon the making of minor technical adjustments), and to issue the building permit. (427 So.2d 242; App. D5)

The trial court judgment was affirmed in all relevant particulars by the Florida Fourth District Court of Appeal on February 16, 1983.[5] *City of Lauderdale Lakes v. Corn*, 427

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[5] Along the way, a dispute arose as to whether the City would be required to post bond on appeal. This controversy was resolved in a published decision at 415 So.2d 1270 (Fla. 1982). The bonding controversy has no significance in this matter.

So.2d 239 (Fla. 1983) (App. D1-11). The court of appeal held that the City was estopped from changing the zoning (to do so would be "grossly unfair'), and that "no element of discretion remains" in the City to deny the site plan and the approval of the plat on the basis of controlling standards is described as "an administrative act" and "ministerial" (427 So.2d at 243-44; App. D9-10), that under Florida law the City's legislative powers were in no sense impinged (427 So.2d at 244; App. D10), that Mr. Corn's vested rights equitably estopped the City from changing the zoning, and that the City should be "held to the same standards of fair dealing that are applied to other entities." (427 So.2d at 244; App. D9-10) The Florida Court of Appeal issued its mandate on March 4, 1983, at which time the decision became final (771 F.Supp. at 1561; App. B5)[6]

F. Mr. Corn In The Federal Courts: Damages Awarded Based On Constitutional Violations

By the time the illegality of the City's acts of frustration had been definitively adjudicated (1985), Mr. Corn had been deprived of the use of the Property for eight years. The window of economic opportunity for the mini-warehouse project had been lost; other varehouse facilities in the area had preempted Mr. Corn's opportunity.

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[6] In spite of the mandate, the City refused to approve the site plan unless Mr. Corn complied with planning requirements (property platting) that came into existence ater July 1977. (771 F.Supp. at 1561; App. B5) On March 26, 1985 the 17th Judicial Circuit Court ordered the City to issue the building permit without platting. (771 F.Supp. at 1562; App. B6)

The market was saturated. the Property remains vacant today.

On January 17, 1984, Mr. Corn filed the underlying case below in the United States District Court for the Southern District of Florida No. 84-6034-CIV, seeking damages for violation of the just compensation, due process and equal protection clauses of the Fifth and Fourteenth Amendments and the Civil Rights Act (42 U.S.C. § 1983). (771 F.Supp. at 1561; App. B5-6)

On October 22, 1985, the district court (Gonzalez, J.) dismissed the action believing it to be unripe under the *Williamson County* test. (771 F.Supp. at 1562; App. B7) In *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987), the Eleventh Circuit reversed, and (significantly) acknowledged the final state court ruling: "A final judgment rendered in Corn's favor estopped the City from rezoning the property during the pendency of Corn's ownership of it." *Id.* at 1515. The "property" thus referred to was, again, the entire Larger Site including the Property.[7]

On August 30, 1991, following a four-day nonjury trial, the District Court (Paine, J.) issued its opinion consisting of findings of fact, conclusions of law and extended damages calculations purportedly pursuant to the Eleventh Circuit standard expressed in *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990) (*Wheeler*

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[7] Having failed to demonstrate that Mr. Corn's action was unripe, the City flip-flopped and argued that it was overripe. But the district court held that the action was not barred by limitations or res judicata, and the Eleventh Circuit affirmed. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990).

IV). The district court's substantive factual findings echoed the state court final judgment, *e.g.*, the passage of critical ordinances on the first reading was without notice and without even an attempt at investigation of the appropriateness of the mini-warehouse use; "the City Council was motivated solely by an irrational desire to thwart CORN's plans." *Corn v. City of Lauderdale Lakes*, 771 F.Supp. at 1569; App. B22.

The District Court presented its conclusions of law in the frame of reference of the *Eide v. Sarasota County* construct. Significant conclusions include: (1) Corn enjoyed vested rights in the pre-July 12, 1977 zoning, and "[t]his issue, having been presented, fully litigated, and resolved in a prior suit between these parties, cannot be relitigated" (771 F.Supp. at 1566; App. B15); (2) Corn enjoyed a protected property interest under Florida law (771 F.Supp. at 1566; App. B15-16); (3) the City acted arbitrarily and capriciously in its actions in July 1977 and thereafter, including its so-called moratorium and report which "seems nothing more than an attempt at *post hoc* rationalization." (771 F.Supp. at 1569; App. B21-22).

G. Twenty-Four Years After The Annexation Agreement And Thirteen Years After Commencement Of Litigation Which Generated Seven Prior Reported Decisions, The Eleventh Circuit Goes Back To Square One, Ignores Prior Factual Determinations By Both State And Federal Courts As Well As Final And Preclusive Legal Findings, And Proceeds As If It Were Writing On A Clean Slate As A Court Of First Instance

This case reached the Eleventh Circuit for the third time following an appeal by Mr. Corn and a cross-appeal

by the City from the District Court's decision. Mr. Corn asserted error in the computation of damages under *Wheeler IV* and in the holding that the individual defendants enjoyed absolute immunity. The City sought to relitigate issues previously and finally decided by the Florida state courts (vested rights) and the Eleventh Circuit (statute of limitations).

The Eleventh Circuit panel, consisting of three judges who had participated in neither of the prior Circuit decisions, wrote as if it were a court of first impression, as if the state court proceedings had never happened or at least as if they had no legal effect, and usurped the District Court's function as trier of fact as well. The Opinion recites the basic state court determinations, but never attempts to reconcile them with its own squarely contrary conclusions, which include a finding that the July 17, 1977 rezoning was proper (no mention is made of the state court estoppel interdiction). (997 F.2d at 1371-72; App. A3-4)[8] Using as its conceptual framework the *Eide v.*

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[8] The Eleventh Circuit apparently saw its mission as not just resolving the discrete controversy presented to it, but also delivering a grand *pronunciamento* with broad impact:

> The district court's error reaches beyond the fisc of one Florida community and the merits of one case . . . More broadly, this case involves questions about how decision-making is allocated between a democratic institution, such as an elected city council, and the federal courts. It involves fundamental issues about the allocation of rights and powers within our constitutional system. (997 F.2d at 1373; App. A7)

The problem with this grandiose language is that the opinion does violence to the precise value it purports to espouse: the proper "allocation of rights and powers within our constitutional system."

Sarasota County template and focusing on substantive due process, the court found that the City had not abused its discretion on July 12, 1977 (997 F.2d at 1373-74, 1386; App. A8, 40) (in contrast to the state court ruling that the City had no discretion as a matter of state law), and that what the City Council did was legislative (997 F.2d 1392-93; App. A54) (in contrast to the state court ruling that it was administrative and ministerial).

The Opinion goes on at length about the neighborhood activist input, in effect acknowledging that it was the basis of the City's decision. (997 F.2d at 1377-87; App. A17-42)

REASONS WHY THE WRIT SHOULD ISSUE

A. The Startling August 13, 1993 Eleventh Circuit Opinion Runs Counter To Monolithic Constitutional, Statutory And Case Law And Threatens To Destabilize The Clearly Defined Mode Of Interaction Between Federal And State Trial And Appellate Courts

1. Striking At The Very Heart Of Federalism, The Eleventh Circuit Ignored Guiding Principles Of Full Faith And Credit, Comity, Preclusion And Due Process Of Law

No concept is more fundamental to the system of federalism than the motion that federal courts must yield to state court determinations of state law, and give full faith and credit to the final judgments of state courts. The City had it exactly right when it wrote in a March 21, 1984 (unsuccessful) Motion to Dismiss:

> In 1980, the Supreme Court of the United States held that issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the state where judgment is rendered. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980).

What the City recognized as obvious, the Eleventh Circuit – which must have known better – chose not to recognize at all. Snubbing the Florida court system, the Eleventh Circuit found that the City's illegal acts were valid.

For more than a century, this Court has recognized that federal courts are bound by construction of state law by state courts. *See, e.g., Commercial Bank of Cincinnati v. Buckingham's Executors*, 46 U.S. 5 How. 317, 342-43 (1847). Moreover, under 28 U.S.C. § 1738, judicial proceedings of a state court "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Thus, with a few exceptions not relevant here, matters finally determined in a state court of competent jurisdiction are not open for reexamination in a federal court. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982).

This bedrock rule not only avoids duplicative litigation and enhances the stability of the law; it also promotes the comity between state and federal courts that is the "bulwark of the federal system." *Allen*, 449 U.S. at 95-96; *see also Kremer*, 456 U.S. at 478. The respect to a

state court final adjudication comity dictates is particularly important when a federal court reviews a situation, as here, where a party's rights are grounded in fully adjudicated state law. *See generally Younger v. Harris*, 401 U.S. 37, 44 (1971).

This concept, which speaks to basic due process of law, controls the relationship of federal and state courts in every substantive field. However, because of the procedure prescribed by this Court in *Williamson County* for "ripening" a land use regulation case, intellectual detours by federal courts such as here present have a particular potential for mischief in this area of the law.

2. The Eleventh Circuit Opinion Penalizes Land Owners Seeking Due Process And Just Compensation For Unconstitutional Land Regulation Who Follow The Procedural Dictates Of This Court

Williamson County holds that before a landowner may seek damages in federal court arising out of unconstitutional land regulation, he must first "seek compensation through the procedure the state has provided for doing so . . . [T]he State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' " *Id.* at 194, 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). Thus, *Williamson County* compels a supplicant to litigate first in state court to "ripen" his cause before seeking damages in federal court. This is exactly what Mr. Corn did here. His reward

at the end of the trial for scrupulously following the procedure this Court prescribed: a Circuit Court of Appeal which simply ignored *at least* these state court findings:

- that Mr. Corn had acquired vested rights under Florida law to develop his property according to the existing zoning and approved 1966 development plan (427 So.2d at 243; App. D8-9);
- that the City lacked discretion under Florida law to change that zoning or to deny approval of the site plan (427 So.2d at 242-44; App. D6-10);
- that the City was expressly estopped by a final judgment from a Florida court of competent jurisdiction from changing the zoning (427 So.2d at 243; App. D9); and
- that ordinances nos. 548, 549 and 552 were void and unenforceable. (427 So.2d at 241-42; App. D5)

These final determinations of state law would have manifestly received collateral estoppel effect under Florida law. *Mobil Oil Corp. v. Shevin*, 354 So.2d 372, 374 (Fla. 1977); *R.D.J. Enters. Inc. v. Media Bank*, 600 So.2d 1229 (Fla. App. 1992). Under section 1738, they bind federal courts as well. *Allen*, 449 U.S. at 96 (issue preclusion or collateral estoppel applies in a § 1983 action); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984) (claim preclusion or res judicata applies in a § 1983 action).

Had the Eleventh Circuit been faithful to its comity obligations, it could not have reached the result it did.

While the District Court understood for the most part the limitations the prior proceedings placed on it,[9] the Eleventh Circuit did not. In view of the preclusive finding that Mr. Corn's rights were vested and the 1977 ordinances which forced the Property into idleness were invalid, liability for a temporary taking was established. *See Lucas v. South Carolina Coastal Comm'n*, 505 U.S. ___, 120 L.Ed.2d 798 (1992). The Eleventh Circuit had but one legitimate qustion [sic] to decide: how much monetary damages should be awarded to Mr. Corn. If the August 13 opinion is followed, landowners will be required to litigate liability in state court, only to face the pointless and duplicative task of doing so all over again in federal court. The horrendous extra burden this will place on litigants and the judiciary cannot be what this Court intended when it promulgated *Williamson County*.

3. The Eleventh Circuit Rode Roughshod Over District Court Factual Findings (Including Findings As To Motive And Intent) In Contravention Of The Well-Defined Allocation Of Power And Duties Between Federal Trial And Appellate Courts

This caption needs little elaboration. The Eleventh Circuit simply ignored findings of fact made by the District Court, which heard the evidence and observed the

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[9] The District Court made an "independent review of the evidence" as to whether Mr. Corn's substantive due process rights were violated, reaching the same result as the state courts. (771 F.Supp. at 1569; App. B21)

witnesses.[10] In its result-driven analysis, the Eleventh Circuit badly overreached, divesting the District Court of its allocated fact-finding powers.

B. In Contravention Of Mr. Corn's Vested Rights And An Established Body Of Constitutional Law, The 1977 City Council Made Decisions It Was Not Empowered To Make, Violating Its Own Required Procedures, And Made Them On Impermissible Grounds

1. By 1977, Mr. Corn's Rights To Build The Mall And Mini-Warehouse Were Vested; The City Was Bound By A State Court Final Judgment Estopping It From Changing The Zoning And Divesting It Of Discretion To Deny The Site Plan

A brief look at the City actions the Eleventh Circuit upheld demonstrates how far it wandered afield. At the time he went into the July 12, 1977 hearing, Mr. Corn enjoyed:

- a development plan approved by the City pursuant to the agreed annexation which entitled him to develop the mini-warehouse project;

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[10] For example, the District Court found that the City was "motivated solely by an irrational desire to thwart CORN's plans." (771 F.Supp. at 1569; App. B22) But it is axiomatic that findings as to motive and intent are factual, and uniquely within the purview of the trial court. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). The testimony of Mayor Howard Craft (*see* n.4, *ante*) is alone sufficient to sustain this finding.

- vested rights under Florida law to so develop;[11]
- a state court final judgment that estopped the City from changing the zoning on the Property; and
- a City Council empowered only to conduct an administrative-ministerial review.

By all reason this should have made the site plan hearing a technical review of details. But the reality was otherwise.

2. Mr. Corn Was Ambushed By The No-Investigation, No-Notice, No-Due Process Extralegal Purported Zoning Change

In enacting the 1977 ordinances with no advance notice, the City not only ignored its own charter requirements, but also ignored the standards which "seem to be universally prescribed in all systems of law established

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[11] The definition of property interests and the determination whether a particular interest is a vested property right to which the protections of the United States Constitution attach are, of course, quintessentially questions of state law. *Preseault v. I.C.C.*, 494 U.S. 1 (1990); *Williamson County*, 473 U.S. at 184; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 973 (1982). As to Florida law, *see Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 16-17 (Fla. 1976). A particularly insightful explication of the meaning of vested rights (rights "which cannot be interfered with or taken away without just comprensation") is found in *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197 (8th Cir. 1983).

by civilized countries."[12] *Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908). Mr. Corn was blindsided: he had no real opportunity to prepare to be heard on the subject matter of any of the ordinances. And the curiously perverse procedure the City adopted of enacting the ordinance first and thereafter undertaking a study to justify the ordinance, not only (again) violated the City charter, but was disturbingly reminiscent of the command of the Queen of Hearts: "Sentence first – verdict afterwards." Carroll, *Alice in Wonderland*, Ch. 12.

As Mayor Craft testified (*see* p. 11 n.4, *ante*), the 1977 City Council paid no attention whatsoever to the solemn commitments the City made to Mr. Corn in 1966. The whole scenario could serve as a textbook prototype of what this Court has defined as constitutionally impermissible: frustration of "investment-backed profit expectations." *Williamson County*, 473 U.S. at 200.

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[12] The denial of notice and hearing, and the failure of the City to follow fair procedures – or even its own procedures – are matters traditionally considered under the rubric of procedural due process. But there is no conceptual reason they cannot be part of a pattern of arbitrary and capricious behavior that implicates substantive due process as well (the procedural due process claim for relief in this case was dismissed before the district court resolution). There is no clear delineation: "[T]he line between "procedure" and "substance" is hazy in the setting of the regulation of land uses." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988). "Where, as here, the plaintiff alleges the denial of the process consists of an official's arbitrary action, a claim for violation of substantive due process is indistinguishable from a claim for violation of procedural due process." *Sierra Lake Reserve v. City of Rocklis*, 938 F.2d 951, 957 (9th Cir. 1991), *cert. granted and judgment vacated*, 113 S.Ct. 31 (1992), *on remand*, 987 F.2d 662 (1992).

The state court holding that the 1977 zoning change was illegal came as no surprise. Florida law unequivocally holds that when a city purports to change a zoning ordinance to defeat a permit application and site plan that would be approved under existing zoning, that City acts "arbitrarily, capriciously, discriminatorily and illegally." *City of Margate v. Amoco Oil Co.*, 546 So.2d 1091, 1093-94 (Fla. App. 1989).

3. Inappropriate Deference To Neighborhood (NIMBY) Activists At The Expense Of Constitutional Rights – The Basis Of The City's 1977 Actions Here – Is An Increasing And Critical Problem Needing Address By This Court

In its 1993 opinion, the Eleventh Circuit called *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), a "red cow," *i.e.*, a precise precedent. (997 F.2d at 1390 & n.2; App. A48) (It is not even close.[13] But the case at bench has one significant fact in common with

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[13] In *Greenbriar*, the landowner sought a change of zoning to enable a desired project as to which he had no right, vested or otherwise [*id.* at 1572, 1581]; here, Mr. Corn sought only to build according to a vested right under *existing* zoning. In *Greenbriar*, the City won below, thus getting the benefit of a favorable review standard; that should have inured to Mr. Corn here. The real "red cows" are *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Southern Co-Op Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), *cert. denied*, 463 U.S. 1208 (1983); and *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B 1981) (*Wheeler I*). In each of these comparable vested rights-substantive due process appeals, the landowner (whose position was not as strong as Mr. Corn's here) prevailed.

Greenbriar: in both cases public officials abdicated their governmental powers in favor of NIMBY activists.[14]

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[14] The August 13 Opinion notes that "[i]n *Greenbriar* . . . the City's decision was based upon "political pressure" from citizen voters who turned out as a crowd to oppose the development." (997 F.2d at 1389; A46). This language from *Greenbriar* (881 F.2d at 1579) is quoted with approval:

> [N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operation of democratic . . . government, operations which are permeated by pressures from special interests . . . The fact "that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws" . . . does not state a claim of denial of substantive due process." (997 F.2d at 1389; A47)

This harsh standard has drawn critical comment from within the Eleventh Circuit. In an acerbic (but finally obedient) opinion, one district judge wrote that *Greenbriar* "clearly stands for the proposition that elected officials who vote on zoning requests can act for purely political reasons, because partisan, political decision-making, even by unknowledgeable, close-minded politicians . . . is automatically deemed rational and, therefore, cannot be arbitrary and capricious unless it is the product of corruption . . . The only limitation appears to be that there be no forty pieces of silver . . . Anything goes! . . . [T]he *Greenbriar* answer . . . simply says, 'THAT's politics!'." *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*, 721 F.Supp. 1212, 1214-16 (N.D. Ala. 1989) (emphasis in original).

Something is disturbingly amiss in the Southeast United States: obeisance to NIMBY activists is proliferating like kudzu.

There is virtually no dispute on this point:[15] the only question is as to the propriety of the abdication.[16]

This problem may be more severe in the Eleventh Circuit than elsewhere, but it approaches crisis proportions throughout the country. It is the subject of a 1990 presidential report by the Advisory Committee on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard" Removing Barriers to Affordable Housing*. Slogans tend to be highminded; the reality behind the acronyms is often no more than social or economic self-aggrandizement. There is every incentive in this situation for public officials – often motivated by nothing more exalted than a desire to perpetuate themselves in office – to count noses and pander. If a court overturns a decision (and they

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[15] The concurring opinion of Judge Hatchett (997 F.2d at 1393-94; App. A57-58) is revealing. It makes but one point, and makes it repeatedly: "nothing in the opinion should be interpreted as creating a new rule of law that developers will always be unsuccessful in stating a substantive due process claim when a large number of citizens oppose a land use proposal"; "we do not hold that local governments will always prevail in defending substantive due process claims whenever their zoning decision follows public meetings where citizens express general welfare concerns" (997 F.2d at 1393, 1394; App. A57-58). Why was this concurrence necessary? Precisely because the majority opinion, fairly read, seems to do precisely what the Judge Hatchett said it did not do; make NIMBY protestation, no matter how self-serving or irrational, a sufficient basis – *in itself, without more* – for land use decisions.

[16] To bolster its conclusion that the NIMBY opposition was a good and sufficient basis for the 1977 City acts, the Eleventh Circuit called the unsworn opinions and idiosyncratic concerns of the activists "evidence" and "facts." (997 F.2d at 1386; App. A38-39)

rarely do), the officials are personally absolved of responsibility. In the process, constitutional safeguards take the hindmost.

The most instructive precedent of this Court is *Washington ex. rel. Seattle Trust Title & Trust Co. v. Roberge*, 278 U.S. 116 (1928). Striking down a zoning ordinance that made operation of a "philanthropic home for children or for old people" contingent on approval of two-thirds of neighbors living within a specified radius as an invalid delegation of power and a violation of the due process clause (*id.* at 118), this Court held (*id.* at 121):

> The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution.

What happened below is uncomfortably close to *Roberge* redux, only worse: it lacks *Roberge's* statutory framework.[17]

Mr. Corn does not suggest that barriers be placed before citizens wishing to appear before a governmental body and thus directly participate in the political process. This is a cherished American tradition; the right to be heard – even when speaking from misinformation or self-

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[17] Also instructive is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (a city may not avoid the strictures of the Constitution "by deferring to the wishes or objections of some fraction of the body politic"). *See also Marks v. City of Chesapeake*, 883 F.2d 308, 310-12 (4th Cir. 1989). Florida state law is consistent that public opposition is not a sufficient basis for zoning decision. *Bailey v. City of St. Augustine Beach*, 538 So.2d 50, 52 (Fla. App. 1989); *BML Investments Inc. v. City of Casselberry*, 476 So.2d 713 (Fla. App. 1985).

interest – must be preserved. But this Court needs to remind regulators that there is a "sanity check"; officials must not yield to public pressure when constitutional rights are at risk.

C. The Eleventh Circuit *Eide* Construct, Central To the [sic] Disposition Of This Case Below, Is Inconsistent With The Teachings Of This Court, And Requires Litigants Challenging Land Use Regulations To Operate Under A Set Of Rules Different From Those In Other Circuits

In *Eide v. Sarasota County*, 908 F.2d 716 (9th Cir. 1990), the Eleventh Circuit unveiled a construct for resolution of constitutional challenges to land use regulations. The Court noted that the required threshold step was "determining what type of claim Eide is making," and then pronounced that there were precisely "four types of challenges [based on allegedly unconstitutional land use regulation] a plaintiff may bring . . . [1] just compensation, [2] due process takings, [3] arbitrary and capricious due process and [4] equal protection claims." *Id.* at 720.

Since *Eide*, this construct has been used pervasively in the Eleventh Circuit, at both trial and appellate levels. *See, e.g., Rearhard v. Lee County*, 968 F.2d 1131, 1134-35 (11th Cir. 1992). It was the matrix for the decision below; the construct is repeated at 997 F.2d 1373-74 (App. A 7-9).[18]

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[18] The Eleventh Circuit construct has been referred to, to Mr. Corn's knowledge, in only one other circuit: it is mentioned as unhelpful in a district court opinion (*Pearson v. City of Grand*

This Court has, of course, adopted its own quite different approach:

> [W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." (citations)
>
> In engaging in these essentially ad hoc, factual inquiries . . .

Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978).[19]

This Court's ad hoc, fact-focused construct posits an almost infinite variety of situations; the Eleventh Circuit posits but four rigid categories. The problem with the kind of categorization exercise the Eleventh Circuit attempted, however intellectually nimble in the abstract,

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Blanc, 756 F.Supp 314, 318 (E.D. Mich. 1991)), and as helpful in the Sixth Circuit affirmance of that opinion (*Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-16 (6th Cir. 1992)).

[19] *See also Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2290 (1993); *Lucas*, 112 S.Ct. at 2893; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986). As this Court emphasized in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), while ad hoc considerations control these cases, "the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance."

is that categorization inevitably means exclusion.[20] There is, for example, no really appropriate place in the Eleventh Circuit template for vested rights. This fact worked adversely to Mr. Corn in this case; the construct had no capacity to recognize the superior status that state-court adjudicated vested property rights enjoy in the hierarchy of protected interests.

The *Eide* construct does not express the test this Court has established. It imposed upon Mr. Corn, and will impose upon future Eleventh Circuit landowner-litigants, a straight-jacket landowners in other circuits will escape.

D. This Case Presents A Vehicle For Resolving The Significant Conflict Which Exists Between The Several Circuits (And Between Federal And State Courts) As To The Breadth Of Substantive Due Process Guarantees In Land Use Cases

The substantive due process analysis in the August 13 opinion (997 F.2d at 1374-76; App. A9-13) did violence to logic and precedent in a number of ways.[21] *First,* it ignored Eleventh Circuit precedent that where a City act

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[20] In *Eide,* 908 F.2d at 724-25 n.15, the Eleventh Circuit gently chided this Court for failing to make clear into which of the four available pigeonholes one of its cases (*Pennell v. City of San Jose,* 485 U.S. 1 (1988)) fits.

[21] The district court found liability under substantive due process. Since the measure of damages under this theory is the same as under a takings claim (*Wheeler v. City of Pleasant Grove,* 833 F.2d 267, 270 n.3 (11th Cir. 1987) (*Wheeler III*)) the district court did not try the inverse condemnation claim; it was remanded by the Circuit. (997 F.2d at 1393 & n.3; App. A56-57)

is *illegal*, as were the zoning change and site plan denial here, such act as a matter of law cannot "bear a substantial relation to the public health, safety, morals or general welfare." (997 F.2d at 1374; App. A10) *See, e.g., AA Profiles*, 850 F.2d at 1488. *Second*, one of the prongs of the test applied was "whether the deprivation . . . is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation." (997 F. 2d at 1374; App. A9) This suggests that the court misperceived what was before it; a constitutional land use regulation claim which implicates the exercise of the state's inherent police power and a self-executing Constitutional provision, and does not sound in tort. *See, e.g., Reardon v. San Francisco*, 66 Cal. 492, 505 (1885).[22] *Third*, the Eleventh Circuit failed to factor in the vested rights and preclusive ruling aspects of the case. The fact significant to this Court is that the analysis bore scant resemblance to the substantive due process analysis this case would have received in other circuits or state courts throughout the land.

The Sixth Circuit opinion in *Pearson v. City of Grand Blanc* contains a circuit-by-circuit review of substantive due process land use law. (961 F.2d at 1217-20) According to *Pearson*, the Third and Fourth Circuits are somewhat more sensitive than others to landowner rights, the Ninth and Eleventh Circuits are essentially congruent in

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[22] "[I]t is not a tort for government to govern . . . " (*Dalehite v. United States*, 346 U.S. 15, 57 (1952) – even if that governance takes private property. Whether just compensation is payable is "an entirely separate question." *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

approach (open to some question in view of the Eleventh Circuit construct), the Eight [sic] Circuit decisions are in such internal disorder that there is no ascertainable circuit position . . . and so on. The Sixth Circuit's own test is extremely draconian; it will interfere in zoning abuse cases only when such abuse is so extreme that it "shocks the conscience." *Id.* at 1222. With respect, the "shocks the conscience" standard shocks the conscience; the right of a citizen to receive rights guaranteed by the Constitution should not be captive to the subjective emotional response of a jurist.

Pearson also stresses that federal courts are typically much more deferential to public entities in substantive due process challenges than state courts. *Id.* at 1221-24. There seems to be little rational basis for this dichotomized hierarchy of protection, particularly when state courts are often called on to determine and enforce rights under the United States constitution.[23] The *Pearson* court concluded:

> We wish it were within our power to harmonize these decisions, but the conflicts among circuits are too great. *Harmony will have to await action by the Supreme Court. Id.* at 1220 n.45. (Emphasis added)

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[23] *Pearson* suggests that a linchpin of the various analyses is whether the critical decision is legislative (high deference) or quasi-judicial, administrative, or ministerial (less deference). In the case at bench, of course, the Eleventh Circuit somehow saw the challenged acts as legislative, even though the preclusive state court rulings held them to be administrative and ministerial. No reason appears why a federal court should be telling a state how to categorize its own governmental decisions.

The quantum of federal constitutional protection a citizen enjoys should not depend on the serendipity accident of geographical location. The case at bench extends as opportunity to cure the pervasive conflicts and conceptual confusion in the application of substantive due process law to land use cases.

E. This Court's Guidance Is Needed In Resolution Of The Recurring Question Of The Proper Measure Of Damages In A Land Use Case Where An Economic Opportunity Is lost Because Of A Temporary Taking

In 1977, when Mr. Corn went before the City, he was on the brink of an exceptional economic opportunity: ownership of the first mini-warehouse in the Lauderdale Lakes area. When the dust settled in 1985, and he was legally empowered to pursue that project, the window of opportunity was gone: the relevant market was saturated.[24]

In context, the related issues are: Where lawless government acts cause the economic feasibility of a contemplated project to be lost forever, does the temporary taking become permanent (Mr. Corn's position below)? If

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[24] As noted *ante*, this question was presented to but not addressed by the Eleventh Circuit, since unaccountably it returned to square one on the liability issue. The District Court spoke to the proper measure of damages for the partial and temporary taking (771 F.Supp. at 1570-71; App. B23-26), and Mr. Corn presented the issue to the Eleventh Circuit at pp. 40-43 of his Opening Brief, and p. 15 of his Brief of Cross-Appellee and Reply Brief For Appellant (question is what damages apply "[i]f by the time the regulations which effected a temporary taking are set aside the confiscated project is no longer feasible)."

not, how may compensation reflect not only the temporary loss of use but the fact that the land may be worth but a fraction of what it was prior to the regulatory freeze? Is an owner required somehow to attempt to mitigate damages by seeking to build consistent with the less desirable zone classification he is challenging (which would render any ultimate vindication pyrrhic)? And where the owner is freed to build part of an integrated project (here the mall) before he is able to develop the remainder, must be proceed with such partial development even though piecemeal construction is economically contra-indicated?

There is some law from lower courts that is helpful, typically only by analogy. *See, e.g., Benenson v. United States,* 548 F.2d 939 (Ct. Cl. 1977). But this Court has not spoken to these recurring problems. Its address would insure fairness and uniformity, and effect a significant saving of time and judicial resources.

CONCLUSION

This case offers almost an embarrassment of certiorari-worthy issues. They engage in very fabric of federal law and speak to the relationships – largely grounded in the United States Constitution – on which that system is based: the relationship of federal courts to state courts, of trial courts to appellate courts, of the judiciary to local governments and of the several institutions of governance to the rights secured in the constitution. The Eleventh Circuit ignored the principles underlying these relationships and ran roughshod over the rules that embody those principles.

The individual right at the center of this controversy is the "personal right in property . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). This Court has reaffirmed the primacy of that right this term, identifying as "an essential principle" the fact that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492, 505 (1993). Regulating authorities and reviewing courts need to be reminded to stop trifling with the constitutional rights of citizens in the name of political expediency.

It has been almost a decade since this court spoke in *Williamson County*. This petition offers an appropriate vehicle to resolve the recurring problems raised in its aftermath.

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Respectfully submitted,

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